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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

PEGGY J. SOUKUP,

Plaintiff and Appellant,

v.

RONALD C. STOCK,

Defendant and Respondent.

B213990

(Los Angeles County  
Super. Ct. No. BC247941)

APPEAL from a judgment of the Superior Court of Los Angeles County, James R. Dunn, Judge. Reversed.

Law Offices of Yvonne M. Renfrew and Yvonne M. Renfrew for Plaintiff and Appellant.

Law Offices of Ronald C. Stock and Ronald C. Stock in pro. per. for Defendant and Respondent.

## I. INTRODUCTION

Plaintiff, Peggy J. Soukup, appeals from a December 15, 2008 summary judgment in favor of defendant, Ronald C. Stock. The Supreme Court previously held plaintiff had established a prima facie case of malicious prosecution. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 293-296 (*Soukup*).) We conclude: the Supreme Court's ruling was law of the case; and defendant has not presented additional or different evidence that would as a matter of law conclusively negate plaintiff's prima facie case so as to negate law of the case principles; therefore it was error to enter a summary judgment for defendant. Accordingly, we reverse the judgment.

## II. BACKGROUND

The long history of related litigation that ultimately spawned this appeal is set forth in *Soukup, supra*, 39 Cal.4th at pages 269-278. This appeal arises out of plaintiff's April 2, 2001 malicious prosecution complaint against defendant and others. Defendant filed a special motion to strike the complaint under Code of Civil Procedure<sup>1</sup> section 425.16. The trial court denied defendant's motion. Ultimately, the Supreme Court issued a published opinion affirming the trial court's order denying defendant's motion. The Supreme Court held, among other things, that plaintiff had demonstrated a probability of prevailing on her malicious prosecution claim against defendant and that defendant in prosecuting an appeal in the underlying action became potentially liable for continuing to prosecute a claim that lacked probable cause. (*Id.* at pp. 296-297.) After remand to the trial court, defendant filed the summary judgment motion that gives rise to the present appeal. The trial court found: "Defendant Ronald C. Stock is entitled to Judgment on the grounds that (1) Defendant Stock has met his burden of showing that plaintiff cannot

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<sup>1</sup> All further statutory references are to the Code of Civil Procedure unless otherwise noted.

establish the element that Defendant Stock prosecuted the underlying action against her without probable cause, and (2) Plaintiff has failed to raise a triable issue on the element that defendant Stock either initiated, or continued to prosecute, the underlying proceeding so as to become potentially liable in this malicious prosecution action.”

### III. DISCUSSION

Plaintiff argues that under *Bergman v. Drum* (2005) 129 Cal.App.4th 11, 14-15, 18, the summary judgment was precluded by the law of the case doctrine. *Bergman* is a decision by our colleagues in Division Three of the Court of Appeal for this appellate district. *Bergman* held that a previous ruling under section 425.16 that a plaintiff has a prima facie case for malicious prosecution is law of the case and it is error to grant a subsequent summary judgment for the defendant on that issue. The prior determination the plaintiff presented a prima facie case of malicious prosecution is sufficient to defeat a subsequent motion for summary judgment “unless the defendant submits to the trial court, in support of such motion, additional or different evidence that would, as a matter of law, *conclusively* negate [the] plaintiff’s prima facie case.” (*Id.* at p. 18, orig. italics.)

The law of the case doctrine is a procedural rule; it does not go to the power of the court. (*People v. Stanley* (1995) 10 Cal.4th 764, 787; *Clemente v. State of California* (1985) 40 Cal.3d 202, 212.) The Supreme Court has described the rule as follows: “The doctrine of the law of the case is this: That where, upon an appeal, the supreme court, in deciding the appeal, states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal . . . , and this although in its subsequent consideration this court may be clearly of the opinion that the former decision is erroneous in that particular. [Citations.]” (*Tally v. Ganahl* (1907) 151 Cal. 418, 421; accord, *Kowis v. Howard* (1992) 3 Cal.4th 888, 892-893; *Clemente v. State of California, supra*, 40 Cal.3d at p. 211.) An appellate ruling on the sufficiency of the evidence to support a finding is a decision upon a question of law.

(*People v. Barragan* (2004) 32 Cal.4th 236, 246.) As the Supreme Court has explained, “Such a determination ‘establishe[s] as the law of the case that all the evidence adduced at the previous trial was insufficient [or sufficient] as a matter of law to establish’ the finding or judgment. ([*Estate of Baird* (1924) 193 Cal. 225,] 234.)” (*People v. Barragan, supra*, 32 Cal.4th at p. 246.) “On the other hand, the law-of-the-case doctrine governs only the principles of law laid down by an appellate court, as applicable to a retrial of fact, and it controls the outcome on retrial only to the extent the evidence is substantially the same. (E.g., *People v. Barragan* [, *supra*,] 32 Cal.4th [at p.] 246.) The doctrine does not limit the new evidence a party may introduce on retrial. (*Id.* at p. 247.)” (*People v. Boyer* (2006) 38 Cal.4th 412, 442.) The law of the case doctrine is principally a judicial economy rule: “The principal reason for the [law of the case] doctrine is judicial economy. ‘Finality is attributed to an initial appellate ruling so as to avoid the further reversal and proceedings on remand that would result if the initial ruling were not adhered to in a later appellate proceeding.’ [Citation.]” (*People v. Stanley, supra*, 10 Cal.4th at p. 786; accord, *People v. Gray* (2005) 37 Cal.4th 168, 196.)

In *Soukup, supra*, 39 Cal.4th at pages 293-296, the Supreme Court held, in a previous appeal in the instant matter, that plaintiff had shown a probability of prevailing against the defendants<sup>2</sup> on all three elements of her malicious prosecution claim—favorable termination, lack of probable cause and malice (*Sheldon Appel Co. v. Albert & Olier* (1989) 47 Cal.3d 863, 871) as to each of the four causes of action asserted against her in the underlying lawsuit. The underlying action alleged plaintiff conspired to harm her former employer, Herbert Hafif and the Law Offices of Herbert Hafif (collectively “Hafif”), by initiating multiple lawsuits against Hafif and by publishing defamatory accusations against Hafif, and provided confidential information to a codefendant, Philip Benson, in furtherance of the conspiracy. As the Supreme Court observed, to prevail on her malicious prosecution claim, plaintiff was required to show only that the defendants lacked probable cause as to one of the four causes of action. (*Soukup, supra*, 39 Cal.4th

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<sup>2</sup> The defendants include Herbert Hafif, the Law Offices of Herbert Hafif, and the defendant here, Mr. Stock.

at p. 293.) The Supreme Court found the evidence demonstrated: plaintiff did not initiate any of the lawsuits against Hafif that were the basis of the underlying malicious prosecution claim against her; she had minimal or no contact with her alleged coconspirators at the relevant times; Mr. Hafif conceded at his deposition that he could not produce any witnesses to testify plaintiff assisted her codefendants in filing their complaints; there was no evidence plaintiff was the source of information provided to a news reporter; there was uncontroverted evidence plaintiff's discussions with a codefendant and former coworker, Philip Benson, occurred while they were both employed by the Hafif firm; there was evidence that to the extent Mr. Benson used confidential information plaintiff provided to him in his wrongful termination action against Hafif, he did so without plaintiff's knowledge or consent; and plaintiff did not conspire with Mr. Benson to extort money or cases from Hafif; further, plaintiff would not have personally benefited from participation in the alleged conspiracy, a fact Mr. Hafif conceded during a deposition—he said he had no idea why plaintiff was involved in the alleged conspiracy. (*Id.* at pp. 293-295.) The Supreme Court relied for its conclusions on plaintiff's responses to defense-propounded interrogatories, plaintiff's declaration, and declarations by three of plaintiff's codefendants and alleged coconspirators—Leo Barajas, Max Killingsworth and Terrie Hutton. (*Id.* at pp. 273, 276-277.)

The Supreme Court separately discussed plaintiff's probability of prevailing against the present defendant. The Supreme Court stated: "Stock separately argues that Soukup cannot show a probability of prevailing on her malicious prosecution claim as to him because his role in the underlying action was limited to that of appellate counsel and there is no tort of malicious prosecution of an appeal. In the context of this case, we disagree. [¶] In *Zamos v. Stroud* (2004) 32 Cal.4th 958, we held that 'an attorney may be held liable for continuing to prosecute a lawsuit discovered to lack probable cause.' (*Id.* at p. 960.) . . . [¶] . . . [¶] The filing of an appeal is "'the continuation of an action.'" (*Zamos v. Stroud, supra*, 32 Cal.4th at p. 969.) Under our reasoning in *Zamos*, therefore, the maintenance of an appeal by plaintiffs in an action discovered to lack

probable cause may expose the plaintiff[s'] attorney to liability for malicious prosecution. We therefore agree with Soukup that Stock cannot insulate himself from such liability, as a matter of law, simply because he asserts that his role in the underlying action was limited to that of appellate counsel. . . . [¶] Soukup also maintains that Stock's participation in the underlying action was greater than simply appearing as appellate counsel. The record appears to bear this out. For example, *in the declaration Stock filed* in support of his motion to strike Soukup's action, *he states* that he was involved in attempting to settle the action and personally communicated the settlement offer to her. In an earlier declaration *he stated* he made appearances on behalf of Hafif in the underlying action and assisted in the preparation of motions including preparing 'a demurrer to [Soukup's] cross-complaint against Mr. Hafif.' Soukup also presented evidence that Stock appeared in at least one deposition in the underlying action. [¶] Based on the respective showings of the parties, we conclude that Soukup has shown a probability of prevailing on her malicious prosecution claim." (*Soukup, supra*, 39 Cal.4th at pp. 296-297, italics added.)

As noted above, the Court of Appeal has held a prior determination under section 425.16 that the plaintiff has presented a prima facie case is *sufficient to defeat* a subsequent motion for summary judgment "*unless* the defendant submits to the trial court, in support of such motion, additional or different evidence that would, *as a matter of law, conclusively negate* [the] plaintiff's prima facie case." (*Bergman v. Drum, supra*, 129 Cal.App.4th at p. 18, italics added in part.) Here, it was defendant's burden, as the party seeking a summary judgment in light of the law of the case, to demonstrate he had submitted additional or different evidence not before the Supreme Court that as a matter of law conclusively negated plaintiff's prima facie case. Defendant has not met that burden. He does not argue and has not shown he submitted new or different evidence in support of his summary judgment motion *that as a matter of law conclusively negated plaintiff's prima facie case*. Defendant avers that, "[T]he evidentiary record created in the prior appeal from the defense of a [section 425.16] motion was the product of a failure to obtain evidentiary rulings on the declarations and exhibits that made up that

record.” He then argues that he did make objections to the declaration plaintiff filed at the summary judgment stage and that once the trial court sustained his objections to that new declaration there was “different” evidence before the trial court that no longer demonstrated a prima facie case. The problem is that the new declaration was superfluous and unnecessary since plaintiff did not have to file any new declaration at all based on law of the case and the holding of the Supreme Court in the prior appeal that a prima facie case existed. Plaintiff could have simply submitted the issue of a prima facie case based on the Supreme Court holding. It was therefore error for the trial court to have focused on perceived deficiencies in the new declaration because the new declaration, even with defendant Stock’s new objections being sustained, did not change the fact that the Supreme Court had already held a prima facie case existed which was binding at the summary judgment stage in the absence of additional or different evidence introduced by defendant that conclusively proved no prima facie case existed. The sustaining of objections to an unnecessary plaintiffs’ declaration at the summary judgment stage does not constitute additional or different evidence produced by the defendant that adds to the evidence previously before the Supreme Court; rather, it deletes unnecessary evidence sought to be presented by plaintiff at the summary judgment stage that was duplicative of other evidence already presented to and considered by the Supreme Court. The objections raised by defendant to plaintiff’s declaration may be made to evidence sought to be introduced at trial, but law of the case precludes relitigating the effect of that evidence at a subsequent summary judgment hearing. The trial court thus erred when it sustained defendant’s objections to the declaration and used that as a basis for granting a summary judgment.

One evidentiary point requires further discussion. The defendants’ conspiracy claim was the lynchpin of its allegations against plaintiff in the underlying action. In support of his instant summary judgment motion, defendant has repeatedly cited diaries kept by plaintiff’s underlying codefendant, Ms. Hutton, as lending crucial support to the claim plaintiff actively conspired with her codefendants. Ms. Hutton’s diaries documented her communications with former Hafif clients who later brought lawsuits

against Hafif. This evidence was before the Supreme Court in *Soukup* and was thoroughly analyzed by the Supreme Court. The Supreme Court held: “[D]efendants repeatedly argue that Terrie Hutton’s diaries demonstrate that they had probable cause to proceed against [plaintiff] in the underlying action. Preliminarily, defendants did not obtain these diaries until after they had filed the underlying action and, therefore, the diaries could not have provided them with probable cause for filing the action and naming [plaintiff] as a defendant in it. *Even more crucially, in all the hundreds of pages of Hutton’s diaries that appear in the appellate record, defendants fail to cite a single passage that specifically would lend support to their theory that Soukup actively conspired with any of the codefendants in the underlying action.*” (*Soukup*, *supra*, 39 Cal.4th at p. 295, italics added.) Moreover, the Supreme Court held the diaries were properly ruled inadmissible against plaintiff and that defendants failed to show that the diaries would be admissible against plaintiff Soukup “on any theory of admissibility.” (*Id.* at p. 295, fn. 22.) The Supreme Court further found that “no matter how often or insistently defendants attempt to rely on these diaries, the *inescapable fact* is that, as to Soukup, they are and remain inadmissible.” (*Ibid.*, italics added.) Thus, the trial court erred in ruling at the summary judgment stage that the diaries were admissible and in considering them in its ruling. This action by the trial court was precluded by law of the case principles.

Defendant also claims he has presented different and additional evidence to support his motion for summary judgment to the effect that Ms. Hutton produced her diaries to the defendants *before* the original complaint was filed in the underlying action. He claims this is new evidence that should prevent application of law of the case principles. Defendant then cites two passages from the diaries as evidence plaintiff conspired with her codefendants. One passage states, “06/24/93 ‘Peggy [Soukup] quit – has as much dirt as Mimi.’” The quote is unattributed. The second passage says, “06/29/94 ‘9:15. Phoned Schielke. Told Sassoon filed suit yesterday. . . . Herb works full time on suits, complaints, letters from former employees. . . . Confirmed Peggy [Soukup] quit and will testify against Hafif.’” The trial court overruled plaintiff’s

evidentiary objection to the Hutton diaries and considered them in granting summary judgment. As we have already noted, the Supreme Court has ruled the diaries are inadmissible as to Soukup. Further, we note the Supreme Court reviewed the Hutton diaries and held they did not support a finding of probable cause. Moreover, even if we ignored this holding by the Supreme Court and did not apply law of the case on this point, the fact is that those specific diary entries are not evidence that conclusively negates plaintiff's prima facie case of malicious prosecution. At best, they create issues of fact to be decided at trial.

Defendant asserts application of the law of the case doctrine is manifestly unfair as relieving plaintiff of the burden to prove her case and is contrary to the Legislature's intent as reflected in subdivision (b)(3) of section 425.16. That argument was answered in *Bergman*. The Court of Appeal held: "Subdivision (b)(3) of [Code of Civil Procedure] section 425.16 states: 'If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible *in evidence* at any later stage of the case, and no burden of proof or degree of proof otherwise applicable shall be affected by the determination.' (Italics added.) The obvious intent of this subdivision of section 425.16 is that a decision by a court that a plaintiff has presented a prima facie case in response to a defendant's section 425.16 motion to strike should not be used as proof that a verdict *in the plaintiff's favor* should be rendered in a later dispositive or potentially dispositive portion of the case, such as at trial or a motion by the plaintiff for summary judgment. [¶] This provision in section 425.16 does not preclude the application of the doctrine of law of the case here because, in the section 425.16 motion, the *only* thing established was the procedural conclusion that plaintiff had presented a *prima facie case* which entitled her to go forward. In the absence of [defendant's] presentation of additional or different factual or legal matter, he is not entitled to reargue the proposition that plaintiff has not presented sufficient evidence to go before a trier of fact. Clearly [the prior] determination . . . will have not an impact on the trial of this matter where plaintiff will have to prove her case for malicious

prosecution. Upon the commencement of the trial, the impact of the law of the case doctrine will simply disappear.” (*Bergman v. Drum, supra*, 129 Cal.App.4th at pp. 20-21.)

We conclude the Supreme Court’s holding that plaintiff had shown a probability of prevailing on her malicious prosecution claim against defendant due to a lack of probable cause and due to defendant Stock’s role as a participant in the case and his continuation of the case as appellate counsel is law of the case applicable to the summary judgment stage of the proceedings. We hold defendant did not submit additional or different evidence not before the Supreme Court that as a matter of law conclusively negates plaintiff’s prima facie case. Therefore, it was error to grant a summary judgment for defendant.

#### IV. DISPOSITION

The December 15, 2008 summary judgment in favor of defendant, Ronald C. Stock, is reversed. Plaintiff, Peggy J. Soukup, is to recover her costs on appeal from defendant, Ronald C. Stock.

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WEISMAN, J.\*

We concur:

ARMSTRONG, ACTING P.J.

MOSK, J.

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.